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What an East Texas groundwater project reveals about a century-old rule

Proposal highlights the need for stronger groundwater protections.

By Vanessa Puig-Williams

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Although it is time for the Legislature or the Texas Supreme Court to dispense with the rule of capture, that action alone will not protect groundwater, writes Vanessa Puig-Williams. In this photo, water springs from the Trinity Aquifer.

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Texas is infamous for the rule of capture, a legal doctrine that, with a few exceptions, means that if your neighbor pumps an excessive amount of groundwater and dries up your well, you cannot sue him for damages.

The rule has become synonymous with property rights in Texas, with many Texans holding dearly onto the notion that if you own your groundwater, you should be able to pump as much as you want. But the rule of capture is not in itself a property right. It just prevents landowners from suing each other.

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[A proposal by billionaire Kyle Bass](#) to pump a massive amount of groundwater from beneath his ranches in rural East Texas has placed renewed attention on the rule of capture and groundwater management (or lack thereof) in Texas.

Residents in Houston County are feeling especially vulnerable to potential declines in groundwater levels from the project because they do not have a groundwater conservation district (GCD) that regulates groundwater pumping. And residents in Henderson and Anderson counties, where the Neches and Trinity Valley GCD is located, are left wondering what their GCD can do to protect them.



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Landowners do own their groundwater as real property in Texas — this has been memorialized in statute and by the Texas Supreme Court. But importantly, in regions where the state has created local GCDs to regulate groundwater production, landowners cannot pump as much groundwater as they want — even though they own it. To protect the property rights of everyone who depends on groundwater — a shared resource — a landowner's right to pump groundwater is limited by a groundwater district's regulations.

Of course, in areas of the state without a GCD (about one-third of the state, including Houston County), landowners are not subject to groundwater regulations. They can pump as much groundwater as they want, and they cannot be sued by neighbors who may be impacted by this pumping.

It is important to note that the existence of a GCD does not eliminate the rule of capture. Even where the Legislature has created a GCD, landowners cannot sue each other for damage caused by groundwater pumping. But ideally, they don't need to, because the GCD is managing groundwater to ensure that everyone across the aquifer is protected. This, however, is not always the case.

At a recent 11-hour House Natural Resources Committee hearing on large-scale groundwater production projects, many witnesses testified that it is time for the Legislature to revisit the rule of capture and groundwater management policies. On July 28, the committee's chairman, state Rep. Cody Harris, R-Palestine, whose district is in the bull's-eye of Bass's groundwater project, filed legislation to essentially repeal the rule of capture and allow landowners to sue one another if their well produces more than 25,000 gallons per day of water (anything less than that is exempt from regulation under Texas law) and causes harm to a neighbor, for example, by lowering the water table and drying up their well.

The rule of capture may have made sense in 1904, when open space was vast and only 3 million people called Texas home. But Harris' legislation demonstrates a growing recognition that the rule is antiquated today in Texas, with a population of more than 31 million, and it prevents landowners from defending and protecting their property rights in groundwater.

This echoes what Texas Supreme Court Justice Nathan Hecht famously wrote in 1997 in his concurring opinion in the Sipriano vs. Great Springs Waters of American, Inc. case, quoting U.S. Supreme Court Justice Oliver Wendell Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Ultimately, however, Hecht agreed with the majority of the court’s holding to affirm the rule of capture, but he added the caveat “only for now,” under the premise that statutory changes and increasing water supply demands “may result before long in a fair, effective, and comprehensive regulation of water use that will make the rule of capture obsolete.” Hecht’s opinion implies that groundwater management is critical to the long-term viability of groundwater supplies and that with a robust framework in place, the rule of capture is irrelevant. He wrote, “In the past several decades, it has become clear, if it was not before, that it is not regulation that threatens progress, but the lack of it.”

Although it is time for the Legislature or the Texas Supreme Court to dispense with the rule of capture, that action alone will not protect groundwater, the state’s largest water supply, because it will not result in better groundwater management.

To truly protect the property rights of all groundwater owners across an aquifer, the Legislature must ensure that every region in Texas is managed by a groundwater conservation district, require districts to proactively manage groundwater, and equip them with the funding and tools to be effective and protect groundwater for the long term.

While current groundwater law gives GCDs authority to regulate groundwater production, the extent of this authority is unclear. Many GCDs are not really *managing* groundwater — they are simply issuing permits with blinders on and lack critical data and science as well as mandates from the Legislature to inform their decisions. The result is that groundwater levels are declining across the state, harming property rights, flows to springs and rivers, and sound water planning.

The massive groundwater project in East Texas has revealed the urgency for the Legislature to act, and there is growing interest by members of the Legislature, including Harris, to give groundwater conservation districts real teeth to protect rural communities’ groundwater. This is critical. Because if the Legislature simply overturns the rule of capture, without making groundwater management more effective, the water supply of millions of rural Texans will still be at risk.

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